Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1223

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,
v.
JOHN J. POTTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPERIOR COURT OF PENNSYLVANIA

GILBERT J. SCUTTI
Counsel for Respondent

Suite 470
1819 J.F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 568-5300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
Constitutional Provisions and Procedural Rules Involved	1
Statement of the Case	2
Summary of Argument	3
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Sabbath v. United States, 391 U.S. 585 (1968) 5

STATE CASES:

Com. v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971) 5

Com. v. Newman, 429 Pa. 441, 240 A.2d 795 (1968) 5

Com. v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) 3

CONSTITUTIONAL PROVISIONS INVOLVED

Pa. Const. Art. 1, Sec. 8 provides:

> Pa. Const. Art. 1, Sec. 8—The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without probable cause, supported by oath or affirmation subscribed to by the affiant.

———o———

PROCEDURAL RULES INVOLVED

Pa. Rules of Crim. Proc. 2007 entitled "Manner of Entry Into Premises" states:

> (a) A law enforcement officer executing a search warrant shall before entry, give, or make a reasonable effort to give, notice of his identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry.
>
> (b) Such officer shall await a response for a reasonable period of time after announcement of identity, authority and purpose, unless exigent circumstances require his immediate forcible entry.
>
> (c) If the officer is not admitted after such a reasonable period, he may use as much physical force to effect entry therein as is necessary to execute the search.

———o———

STATEMENT OF THE CASE

The Pennsylvania courts that denounced the search of respondent's home determined that the method by which the police gained entry transgressed the search and seizure clauses of both the state and federal constitutions. As the Superior Court ruled: "the police officers . . . violated the 'knock and announce' rule, Pa. R. Crim. P. 2007, which is a codification of the Fourth Amendment and Art. 1, Section 8 of the Pennsylvania constitution . . ." Appendix to Petition for Writ of Certiorari at 5B. See also Appendix at 5C.

The violation of the above-described rule was both patent and substantive. The rule requires that, absent exigent circumstances, a police officer executing a search warrant must afford a homeowner a reasonable opportunity to surrender his premises after the officer has announced his identity and purpose. Here, several police officers looked in the front door of respondent's home and observed him sitting on the couch watching television. They knew that respondent was a federal employee with no prior record. Based on his background and the innocuousness of his conduct as observed by the police, respondent posed little threat of resistance to the armed officers. Indeed, the situation was serene enough to enable the officers to knock and announce their identity and purpose. Nevertheless, immediately after so doing, the officers invaded respondent's home without affording him the opportunity to do anything. Appendix 4D.

The Commonwealth has not argued that the officers were confronted with exigent circumstances. Indeed, the

act of knocking and announcing their identity and purpose would gainsay such an argument here. Instead, the Commonwealth has attempted to convince the state courts that drug cases require special rules because given an opportunity to do so a drug suspect will destroy evidence. Particularly because of the docile nature of both the defendant and his setting on the day of the search, the courts have rejected this argument. As an alternate approach, the Commonwealth has argued for a rule of "substantial compliance" by which the police need only honor two-thirds of a suspect's constitutional rights. Particularly in view of the plain language of the rule and its important constitutional underpinnings, the state courts have also rejected this position.

———o———

SUMMARY OF ARGUMENT

The judgment of the Pennsylvania state courts is grounded in part in that state's own constitutional proscription against unreasonable searches and seizures. Hence, it should not be subjected to federal constitutional analysis.

The officers who executed the search warrant for respondent's home failed to comply with a plainly worded state rule of criminal procedure defining the procedure for executing warrants. Inasmuch as no exigent circumstances were presented, the state courts properly denounced the search.

———o———

ARGUMENT

The threshold question is whether this Court should review the interpretation by the state courts of a right that flows in part from the state constitution. The rule governing how a search warrant is to be executed in Pennsylvania is grounded in both the state and the federal constitutions. A state is entitled to construe a provision of its own constitution so as to provide more expansive rights than its federal counterpart. See, e.g., *Com. v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981). In its petition to this Court, the Commonwealth has largely ignored the fact that the lower courts that declared the search illegal were interpreting a state rule of criminal procedure emanating from a state constitutional proscription against unreasonable searches and seizures. It is respectfully submitted that this fact cannot be ignored; however. A state's effort to define how one of its officers is to execute a state search warrant should not be subjected to federal constitutional analysis.

Moreover, the search at issue was plainly illegal under the law of the Commonwealth of Pennsylvania. The rule of criminal procedure that was violated here articulates a step by step method for executing a search warrant. It requires that, absent exigent circumstances, a police officer must afford a homeowner a reasonable period of time to peacefully surrender his premises before entering the home. The Supreme Court of Pennsylvania has described the constitutional implications of this rule as follows:

> It is settled in this Commonwealth that the Fourth Amendment prohibition against unreasonable searches

> and seizures demands that before a police officer enters upon private premises to conduct a search or to make an arrest, he must, absent exigent circumstances, give notice of his identity and announce his purpose . . . The purpose of this announcement is that " . . . the dignity and privacy protected by the Fourth Amendment demand a certain propriety on the part of the policemen even after they have been authorized to invade an individual's privacy. Regardless of how great the probable cause to believe a man guilty of a crime, *he must be given a reasonable opportunity to surrender his privacy voluntarily.*" . . . Accordingly, even where the police duly announce their identity and purpose, forcible entry is still unreasonable and hence violative of the Fourth Amendment if the occupants of the premises sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily.

Com. v. DeMichel, 442 Pa. 553, 277 A.2d 159, 163 (1971) (emphasis added). See also *Com. v. Newman*, 429 Pa. 441, 240 A.2d 795 (1968).

Here, the police ignored the plain prohibition of the rule by invading respondent's home without giving him the chance to voluntarily surrender it. It is vital to observe that no entry, forcible or otherwise, is permitted in violation of this rule. As this Court has pronounced:

> [a]n unannounced intrusion into a dwelling . . . is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed, but unlocked door. The protection afforded by, and the values inherent in [18 USC] sec. 3109 must be 'governed by something more than the fortuitous circumstances of an unlocked door.'

Sabbath v. United States, 391 U.S. 585 (1968).

The fundamental fact that dooms the Commonwealth's position here is that no exigent circumstances were presented either when the officers first arrived at respondent's home or after the officers complied with two-thirds of the rule by knocking and announcing their purpose. The respondent was at all times sitting on his couch watching television. Given his background and his activity on the day of the search, it is difficult to fathom a more docile setting within which to execute a warrant. Given the absence of exigent circumstances, the Pennsylvania courts were unwilling to approve such a patent violation of the state's rule for executing a search warrant. It is respectfully submitted that the Court should not interfere with their judgment.

———o———

CONCLUSION

Wherefore, Respondent John J. Potts respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GILBERT J. SCUTTI
Counsel for Respondent